

TALECE INC.,
Plaintiff,
v.
ZHENG ZHANG,
Defendant.

ZHENG ZHANG,
Third-party Plaintiff,
v.
LANHAI SU,
Third-party Defendant.

Case No. 20-cv-03579-BLF

**ORDER DENYING MOTION TO
STRIKE AFFIRMATIVE DEFENSES**

[Re: ECF No. 93]

Before the Court is Defendant and Third-Party Plaintiff Zheng Zhang's motion to strike affirmative defenses asserted in answers to the First Amended Counter- and Third-Party Complaint. ECF No. 93 ("MTS"); *see also* ECF No. 96 ("Reply"). Zhang seeks to strike the affirmative defenses pled by Plaintiff Talece Inc. and Third-Party Defendant Lanhai Su as inadequately pled under Federal Rules of Civil Procedure 8(a) and 9(b). *See* ECF No. 91 (Talece answer); ECF No. 92 (Su answer). Talece and Su oppose the motion. *See* ECF No. 95 ("Opp."). The Court finds this motion suitable for disposition without oral argument and VACATES the April 28, 2022 hearing. *See* Civ. L.R. 7-1(b). The Court DENIES the motion.

I. BACKGROUND

The parties are familiar with the background of this case, as recounted in the Court's

1 previous order on (1) the motion to dismiss and strike filed by Talece and (2) the motion to
2 dismiss filed by Su. *See* ECF No. 88.

3 II. LEGAL STANDARD

4 Federal Rule of Civil Procedure 12(f) permits a court to “strike from a pleading an
5 insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” The
6 function of a motion made under this rule is “to avoid the expenditure of time and money that
7 must arise from litigating spurious issues by dispensing with those issues prior to trial.”
8 *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010) (quotation marks and
9 citation omitted). “While a Rule 12(f) motion provides the means to excise improper materials
10 from pleadings, such motions are generally disfavored because the motions may be used as
11 delaying tactics and because of the strong policy favoring resolution on the merits.” *Barnes v. AT*
12 & T Pension Ben. Plan-Nonbargained Program, 718 F. Supp. 2d 1167, 1170 (N.D. Cal. 2010).
13 “The key to determining the sufficiency of pleading an affirmative defense is whether it gives
14 plaintiff fair notice of the defense.” *Wyshak v. City Nat. Bank*, 607 F.2d 824, 827 (9th Cir. 1979).

15 III. DISCUSSION

16 A. Motion to Strike All Affirmative Defenses (Rule 8(a))

17 Zhang first moves to strike “[a]ll 52 affirmative defenses pled by Talece and Su” because
18 they lack plausibility under Rules 8(a) and the explication of Rule 8 in *Bell Atl. Corp. v. Twombly*,
19 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). MTS at 2–4. Talece and Su
20 oppose, arguing that Zhang does not provide argument as to why each specific affirmative defense
21 should be stricken and, where he does, those arguments are not persuasive. Opp. at 3–5.

22 The Court declines to issue an order striking all of Talece and Su’s affirmative defenses.
23 Zhang cannot expect the Court itself to analyze the twenty-five affirmative defenses asserted by
24 Talece and the twenty-six asserted by Su without any legal argument as to why each specific
25 affirmative defense is insufficiently pled. The Court will not fill in gaps in argument for Zhang,
26 particularly in a motion that is “generally disfavored” due to its frequent misuse as a “delaying
27 tactic[.]” *Barnes*, 718 F. Supp. 2d at 1170.

28 Zhang takes issue with the following specific affirmative defenses:

1 First Affirmative Defense (Failure to State a Claim). Zhang says that this is not an
2 affirmative defense and that the Court has already ruled that the counter- and third-party claims
3 have been sufficiently pled. MTS at 4:1–3. The Court rejected this very argument when it refused
4 to strike the same affirmative defense asserted in own Zhang’s answer—an affirmative defense
5 that Zhang himself defended. *See* ECF No. 88 at 5. Zhang cannot simultaneously defend the
6 affirmative defense when he asserts it in his own answer and then assert it should be stricken when
7 his opponents assert it in their answers.

8 Second and Seventh Affirmative Defenses. Zhang argues that the second and seventh
9 affirmative defenses are identical because they both “allege that [he] committed equity.” MTS at
10 4:4–7. This is both unclear and factually incorrect. In both answers, the second affirmative
11 defense is “failure to mitigate damages, if any” and the seventh is “unclean hands.” ECF No. 91 at
12 8–9; ECF No. 92 at 9, 10. The Court finds that Zhang has “fair notice” of the basis for these
13 affirmative defenses. *Wyshak*, 607 F.2d at 827. The primary complaint in this case asserts claims
14 against Zhang, including conversion, breach of fiduciary duty, and unjust enrichment, and
15 provides a plausible factual basis for those claims, as the Court has already found. *See* ECF No.
16 61. Zhang thus has fair notice of the allegations Talece and Su have asserted against him that are
17 the bases for these affirmative defenses.

18 Eleventh and Twenty-Fourth Affirmative Defenses. Zhang argues that these affirmative
19 defenses are also identical because one says that Talece’s action is privileged under the business
20 judgment rule and the other generically asserts that Talece’s acts were “privileged.” MTS at 4:8–
21 10. While these affirmative defenses are closer in similarity than are the second and seventh
22 affirmative defenses, they are not identical, and Zhang’s argument that “no other potential
23 ‘privilege’ could exist in this corporate-shareholder dispute,” *id.*, is not supported by any
24 authority. Because Zhang has not provided a legal basis to strike the defenses, the Court declines
25 to do so.

26 Twenty-Sixth Affirmative Defense (No Duty). Zhang argues that the affirmative defense
27 for “no duty” should be stricken because it “has no possible application to this case” where
28 “Talece has already conceded that it owes a fiduciary duty to its corporate shareholders, third party

1 plaintiff [Zhang].” MTS at 4:11–13. But as Talece responds, its answer has specifically denied
2 that Zhang is a shareholder of Talece, so the affirmative defense accordingly asserts that it lacks
3 any duty to Zhang. Opp. at 3. The Court finds that this gives Zhang fair notice of the defense
4 asserted, and thus the Court will not strike this affirmative defense.

5 Thirteenth Affirmative Defense (Unjust Enrichment). Zhang argues that the affirmative
6 defense for unjust enrichment should be stricken because it “does not apply to statutory damages
7 under the False Claim[s] Act.” MTS at 4:15–21. But Zhang has asserted breach of fiduciary duty
8 and conversion claims to which the unjust enrichment affirmative defense may apply. *Accord*
9 Opp. at 4. The Court accordingly declines to strike the affirmative defense.

10 Additional Affirmative Defenses Challenged in Reply. Zhang calls out additional
11 allegedly deficient affirmative defenses in reply: the third, sixth, and fourteenth affirmative
12 defenses. *See* Reply at 6:4–14, 7:6–9. The Court declines to address arguments against those
13 affirmative defenses that are raised for the first time in reply. *Zamani v. Carnes*, 491 F.3d 990,
14 997 (9th Cir. 2007).

15 **B. Motion to Strike Affirmative Defenses 7–10 (Rule 9(b))**

16 Zhang then moves to strike four specific equitable affirmative defenses as insufficiently
17 pled under Rule 9(b): affirmative defenses for unclean hands, waiver, estoppel, and “one who
18 seeks equity must do equity.” MTS at 5–6. Talece and Su respond that these affirmative defenses
19 are adequately pled. *See* Opp. at 4.

20 For the same reasons as in rejecting his challenge to the seventh affirmative defense under
21 Rule 8, the Court rejects the challenge to these affirmative defenses under Rule 9(b). Zhang has
22 sufficient notice of the grounds on which Talece and Su claim he acted inequitably because Talece
23 has outlined those allegations in the primary complaint in this case. The Court has already
24 rejected Zhang’s motion to dismiss the claims in that complaint, finding an adequately pleaded
25 factual basis for them under Rule 12(b)(6) and, where applicable, Rule 9(b). *See* ECF No. 61 at 6–
26 9. The Court will not collaterally revisit that ruling through a Rule 12(f) motion.

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1 **IV. ORDER**

2 Accordingly, the motion to strike is DENIED. The case schedule, ECF Nos. 63, 75,
3 remains in effect.

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5 Dated: February 25, 2022

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BETH LABSON FREEMAN
United States District Judge